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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

REPLY COMMENTS OF LIBERTY MEDIA CORPORATION

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SUMMARY

The Commission has acknowledged that "increased horizontal concentration" has yielded "the economies of scale necessary to encourage investment in new programming services and the deployment of advanced cable technologies" which both Congress and the Commission have recognized to be in the public interest. The comments in this proceeding have confirmed these benefits of higher "concentration" of cable ownership.

Further, the comments conclusively demonstrate that a national horizontal ownership limit of at least 35 percent of homes passed will not permit the exercise of undue market power or stifle the introduction of new programming services. This less restrictive horizontal ownership limit is consistent with and supported by: well-established judicial and analytical precedent; the Besen Analysis tendered by TCI; higher concentration levels present in numerous other industries; empirical data demonstrating that many national programming services have existed with less than 65 percent of today's cable subscribers; and the comprehensive protections afforded by Sections 9, 12 and 19 of the 1992 Cable Act. The only parties supporting the Commission's proposed ownership limit -- MPAA and Local Governments -- rely on their unsupported "beliefs," without any empirical support.

There can be no dispute that cable operator investments have expanded the quantity and diversity of programming available to viewers. Further, as the Commission has recognized, the record in this proceeding evidences the absence of

any pattern of discrimination against unaffiliated programmers and suggests that cable operators have little incentive to engage in such discrimination.

The record supports channel occupancy limits of at least 40 percent of all activated channels. However, the Commission's attribution standard is far too low and over-inclusive. Clearly, an equity interest substantially greater than 5 percent would be required potentially to induce a cable operator to act on any incentive to discriminate. The record strongly supports exclusions from the channel occupancy limits for local, regional, and minority programming services. Again, only MPAA and Local Governments support more stringent channel occupancy limits. However, both MPAA and Local Governments simply ignore the diversity provided by must-carry, leased access, and PEG channels.

The Commission should express the channel occupancy limits in terms of bandwidth, which approach is consistent with the statutory definition of "channel" and will better accommodate technological change. Other revisions for multiplex, pay-per-view, and new services are required or, alternatively, suggest the need for less restrictive channel occupancy limits. In any event, the Commission now should establish a channel capacity ceiling beyond which the channel occupancy limits would no longer apply. Finally, because unaffiliated programmers will assist in ensuring compliance with such limits, complaint-based enforcement by the Commission would be effective and would minimize the burdens on the Commission and cable operators.

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REPLY COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") submits these reply comments in response to the Further Notice of Proposed Rulemaking ("Further Notice") in this proceeding. The comments in response to the Further Notice confirm that the Commission should adopt less restrictive ownership and channel occupancy limits than those in its proposal.

Introduction

Congress directed the Commission to adopt regulations so that cable operators cannot "unfairly impede" or "unreasonably restrict" the "flow of video programming" by virtue of their size or affiliation with particular programming services. 47 U.S.C. §533(f)(2)(A), (B). However, the Commission also must ensure that its regulations "account for any efficiencies and other benefits that might be gained through *increased* ownership or control" and do not "impair the development of diverse and high-quality video programming." Id. at (f)(2)(D), (G) (emphasis added). Finally, Congress directed the Commission to "take particular account" of the "market structure, ownership patterns, and other relationships" in the cable industry, making sure that its regulations "reflect the dynamic nature of the communications marketplace." Id. at (f)(2)(C), (E).

In three rounds of comments in this rulemaking, not one cable programming service -- whether failed or successful, proposed or well-established -- has claimed that any cable operator has exercised horizontal market power or has discriminated against it in favor of a programming service in which that operator had an ownership interest. Nor has any commenter introduced empirical evidence of any abuse of market power or discrimination. Indeed, the only empirical studies in the record confirm that cable operators do not have undue market power and have not discriminated against unaffiliated programming services. S.M. Besen, S.R. Brenner, and J.R. Woodbury, "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions" (Feb. 9, 1993) ("Besen Analysis"); R.W. Crandall, "Vertical Integration and Cable Operator Carriage Decisions," filed with Liberty Media's Reply Comments on May 12, 1993 ("Crandall Analysis").

In contrast, cable programmers have confirmed that timely investments by cable operators enabled such programmers to initiate or to maintain programming services which have increased viewing diversity. See, e.g., Comments of Discovery Communications, Inc. at 2; Comments of International

Family Entertainment, Inc. at 2; Comments of E! Entertainment Television, Inc. at 1; Comments of Turner Broadcasting System, Inc. ("Turner") at 12. Both Congress and the Commission have recognized expressly the substantial contribution of cable operators to program diversity. Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 29 (1992) ("House Report"); Further Notice at ¶208.

Congress has directed the Commission to exercise its discretion in fashioning rules that properly balance the statutory objectives. The record in this proceeding establishes the benefits of "horizontal concentration" and "vertical integration" and the absence of any abuse or actual injury. It compels a finding that the ownership limits -- which constitute long-term structural constraints on the cable industry and necessarily infringe upon the First Amendment rights of cable operators -- should be less restrictive.

I. The Record Does Not Support A National Ownership Limit Lower Than 35 Percent Of Homes Passed.

The Commission acknowledged in its Further Notice that "increased horizontal concentration" has yielded "the economies of scale necessary to encourage investment in new programming services and the deployment of advanced cable technologies" which both Congress and the Commission have recognized to be in the public interest. Id. at ¶147.

Commission's prior findings based on an exhaustive review of the cable television industry:

> We agree with a number of commenters in this proceeding, including other federal agencies and various cable interests, that horizontal concentration and vertical integration produces significant benefits for cable subscribers. Higher concentration levels in the cable industry have enabled companies to take advantage of valuable economies of scale and foster investment in more and better program sources, which lead to more investment in programming, more original programming and a wealth of new viewing options for consumers.

Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 5008-09 (1990) ("Report to Congress") (note omitted).

The comments in this proceeding have confirmed these benefits of higher concentration of cable ownership.[1] Fur-

[1] The Motion Picture Association of America, Inc. ("MPAA") asserts that cable operators serving fewer than 6 percent of all cable subscribers have invested in programming services and in new technologies and argues that greater concentration "is clearly not a pre-condition" for such investment. See MPAA Further Comments at 3 nn.6, 7. However, MPAA makes no effort to quantify such investments, analyze their respective risk, or compare them to the investments in programming, research and development, and capital equipment of the larger MSOs, i.e. Tele-Communications, Inc. ("TCI") and Time Warner Entertainment Company, L.P. ("Time Warner"). The Besen Analysis conclusively establishes, however, that the largest MSOs are the most likely sources of capital for innovative services and technology:

> Economies of scale also exist in administration and planning for new technologies and services. Many of the costs of these activities are independent of the number of subscribers being served. Because smaller MSOs will have higher costs per subscriber, they are likely to invest less in planning for new technologies and services.

Besen Analysis at 8.

ther, the comments conclusively demonstrate that a national horizontal ownership limit of at least 35 percent of homes passed, the upper limit under consideration by the Commission (Further Notice at ¶147), will not permit the exercise of undue market power or stifle the introduction of new programming services:

- Under well-established antitrust precedent, a market share of 40 percent or less virtually precludes a finding of monopoly or monopsony power. TCI Comments at 18-22; Time Warner Comments at 22-24.

- Firms in a variety of industries ranging from greeting cards and cereals to candy bars and shaving products have market shares exceeding 40 percent. See TCI Comments at 23.

- The sole economic analysis of these issues, which no commenter has disputed, concludes that increased horizontal concentration results in "efficiencies both in program acquisition and in planning and developing new technologies and services" and that neither current levels of horizontal concentration nor an increase in that concentration "pose a substantial threat of increased market power and reduced program diversity." Besen Analysis at 1-2.

- Because of the growth of cable television, only 60 percent of today's subscribers exceed the total number of cable subscribers in 1985, when there were no fewer than 49 national programming services. Liberty Media Comments at 35 n.15.[2]

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[2] These data are consistent with and support the Commission's prior finding based on its examination of the cable industry that "[t]he record does not demonstrate, however, that horizontal concentration or vertical integration provides any MSO with the unilateral ability to prevent the launch of new programming services." Report to Congress, 5 FCC Rcd. at 5031. The behavioral protections afforded by Section 12 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") would preclude concerted activity.

- Numerous programming services have been successful at penetration levels of less than 65 percent, and at least 39 programming services presently have fewer than 33 million subscribers. TCI Comments at 24-25; Liberty Media Comments at 35 n.15.

- Pursuant to Sections 9, 12 and 19 of the 1992 Cable Act, comprehensive behavioral protections -- regulating leased access, carriage agreements, and program access -- further minimize the potential for anti-competitive action.[3]

Only MPAA and the Local Governments support the Commission's tentative proposal to limit cable operator ownership to 25 percent of homes passed. MPAA Further Comments at 2-4; Further Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties ("Local Governments") at 14. However, both MPAA and the Local Governments offer little more than their respective "beliefs," without any empirical support:

> Local Governments believe that a subscriber limit over 25% would negate any benefit that such a limit would engender, since an MSO that were to reach over 25% of the nation's cable homes would yield excessive market power.

Local Governments Further Comments at 14.

> We believe, however, that 25% is the absolute outer limit of tolerable concentration and even with this cap in place would urge the Commission to reexamine this issue should two or more multiple system operators approach this ceiling.

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[3] MPAA acknowledged in its initial Comments at 4 that "[i]n the main, we believe that the requirements of the 1992 Act that directly address the cable operator/video programmer relationship hold out great potential to promote program diversity." (emphasis in original).

* * *

> We strongly oppose a higher subscriber cap. There are no compelling public interest reasons for a higher number, and certainly none that outweigh the diversity goals established by the Congress. Greater concentration is clearly not a precondition for cable operator investment in new programming services or deployment of advanced cable technologies.

MPAA Further Comments at 2-3 (notes omitted).

In offering these "beliefs," neither MPAA nor the Local Governments address: the contrary and well-established judicial and analytical precedent; the Besen Analysis tendered by TCI; higher concentration levels present in numerous other industries; empirical data conclusively demonstrating that numerous national programming services have existed with less than 65 percent of today's cable subscribers;[4] and the comprehensive protections afforded by Sections 9, 12 and 19 of the 1992 Cable Act. The unsupported beliefs of MPAA and the Local Governments cannot substitute for the empirical data required to justify this structural constraint on the growth and devel-

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[4] MPAA asserts that it is "significant that programming services said to have had 'great success with penetration levels of less than 30% to 40%' are all vertically integrated." MPAA Further Comments at 4 n.9. MPAA's assertion that it is "virtually impossible to find an independent programming service that can sustain itself with such low penetration" is simply wrong. Id. For example, America's Disability Channel, Fox Net, The Inspirational Network, International Channel, MOR Music Television, Nostalgia Television, The Sci-Fi Channel, Telemundo, Trinity Broadcasting Network, Univision and ValueVision have less than 40 percent penetration and are unaffiliated with any cable operator. See CableVision, June 7, 1993, at 128. Further, MPAA never explains what is "significant" about the affiliation of other programming services with modest penetration levels. It offers no explanation because its distinction makes no difference.

opment of the cable industry. The record establishes that: (1) the consolidation of cable ownership has fostered new services and technology; and (2) national ownership limits of at least 35 percent of all homes passed would not "unfairly impede" or "unreasonably restrict" the "flow of video programming" to subscribers. Lower national ownership limits are unsupported by the record and would be arbitrary and capricious.

II. The Record Supports A Less Restrictive Channel Occupancy Limit Of At Least 40 Percent Of All Activated "Channels."

A. Any Channel Occupancy Limit Must Be At Least 40 Percent Of All Activated Channels.

There can be no dispute that cable operator investments have expanded the quantity and diversity of programming available to viewers. No commenter claims otherwise in this proceeding. Nonetheless, because Congress was concerned that cable operators may have "the ability and the incentive to favor their affiliated programmers," it directed the Commission to adopt channel occupancy limits, balancing this potential harm[5] against these real benefits.

After reviewing the initial comments and reply comments in this proceeding, the Commission concluded, consistent with its prior findings, that:

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[5] Indeed, Congress recognized that "some concerns about discrimination against rival programming services may be overstated." House Report at 41.

[T]he record in this proceeding, as well as other empirical sources, demonstrate a lack of evidence that might indicate a pattern of vertically integrated MSO's denying system access to unaffiliated or competing cable programmers.

Further Notice at ¶182. Further, Dr. Crandall's expert analysis of these issues confirms that any incentive to discriminate "is limited and outweighed by the need to meet viewer demand by offering the best programming available." Crandall Analysis at 10. The costs of such discrimination "'in terms of foregone profits that would otherwise have been earned' would outweigh such benefits." Id.; see Besen Analysis at 28-43. These data and analyses demonstrate the absence of discrimination and compel the adoption of less restrictive channel occupancy limits which will permit the continued investment by cable operators in programming services.[6]

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[6] Liberty Media supports the Commission's tentative conclusion to "grandfather" the carriage of all affiliated programming services. Further Notice at ¶236. Although a step in the right direction, "grandfathering" existing carriage will not remedy the adverse impact of overly restrictive channel occupancy limits. Although Liberty Media's principal business is the development of programming services, the Commission's "grandfathering" proposal does not provide for continued growth in and development of programming. With the single exception of the Local Governments, all other parties addressing this issue similarly supported the Commission's determination. The Local Governments' opposition largely is founded upon their claim that, absent explicit Congressional authorization, the Commission is precluded from "grandfathering" existing carriage arrangements. Local Governments Further Comments at 12-13. However, Local Governments ignore the Congressional directive that the Commission "take particular account of the market structure, ownership patterns, and other relationships of the cable television industry" and the discretion accorded to the Commission. 47 U.S.C. §533(f)(2)(C).

Only Local Governments and MPAA support more stringent channel occupancy limits.[7] See Local Governments Further Comments at 6-13; MPAA Further Comments at 7-11. Although Local Governments nominally endorse a 40 percent channel occupancy limit, they render such limit meaningless by proposing to exclude all "over-the-air broadcast channels, PEG channels and non-video channels" from the number of activated channels to which that limit would be applied. Local Governments Further Comments at 7. However, Local Governments make no effort to explain why must-carry, leased access, and PEG channels, which clearly provide programming diversity, should not be included among activated channels.[8] Indeed, these mandatory carriage requirements constitute a de facto channel occupancy limit and ensure that cable operators devote a substantial number of channels to unaffiliated programming.

The MPAA proposes an unreasonably low channel occupancy cap of only 20 percent of activated channels with a somewhat more realistic attribution standard of 15 percent which is discussed infra at 12-13. MPAA Further Comments at

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[7] The Community Broadcasters Association ("CBA"), a trade association representing licensees and permittees of low-power television stations, also appears to support more restrictive channel occupancy limits. CBA Further Comments at 1-2. CBA's purported justification for such limits is misplaced. It points to "[r]ecent developments where cable operators have negotiated channel capacity for retransmission consent," i.e. agreements to carry unaffiliated programmers. Id. at 2 n.1. Further, "qualified low power stations" are accorded must-carry status under 47 U.S.C. §534.

[8] Local Governments quote from the legislative history of the 1992 Cable Act, apparently suggesting that leased access channels also should be excluded. Id.

7. MPAA claims that it is "critical in particular that the channel cap be kept to the lower limit in order to insure that there is diversity of voices in programming cable channels." Id. As support for this assertion, MPAA offers an Attachment A which purports to apply to Commission's rules to two TCI systems.

In fact, MPAA's "examples" are merely hypotheticals which ignore the diversity afforded by the Commission's must-carry and PEG requirements. Thus, in its 36 channel example, MPAA assumes that 19 channels -- more than half of the system's channel capacity -- are devoted to must-carry and PEG channels. In its 54 channel example, 25 channels are devoted to must-carry and PEG channels. Yet, MPAA claims that the cable operator would carry "no unaffiliated programming networks" in its 36 channel example and "as few as five unaffiliated programming networks" in its 54 channel example. Id. at 8 (emphasis in original). Contrary to MPAA's assertions, its "examples" demonstrate the mandatory diversity requirements and de facto channel occupancy limits already imposed upon cable operators and support higher channel occupancy limits in this proceeding.

B. A Less Inclusive Attribution Standard Is Warranted.

Although the record supports channel occupancy limits of at least 40 percent of all activated channels, the Commission's attribution standard is far too low. See, e.g., Further Comments of National Cable Television Association, Inc. ("NCTA") at 17-19; Time Warner Further Comments at 31-32. As set forth in Liberty Media's Further Comments at 17-18, the underlying rationale for the Commission's tentative selection of the broadcast attribution criteria is inapplicable. Here, the relevant issue is not who can influence or control the programming decisions of a cable system. Instead, the issue is the point at which a cable operator's ownership interest in a programming service provides a sufficient economic incentive to carry that service rather than a more popular unaffiliated programming service.

Clearly, an equity interest substantially greater than 5 percent would be required potentially to induce a cable operator to act on such incentive:

> Where, as appears to be typically the case, a cable operator has only a minority interest in a programming service, its incentive is even smaller and the countervailing forces larger.

Crandall Analysis at 10. At the very least, as the Commission suggests in its Further Notice at ¶202, it should establish higher equity thresholds for new programming services and services in which more than one cable operator holds a minority interest. This approach "take[s] particular account" of the existing "market structures" and "ownership patterns" in the cable industry as required by Congress. See 47 U.S.C. §533(f)(2)(C).

Indeed, in continuing to support an attribution standard of 15 percent, MPAA acknowledges the "marketplace circumstances" justifying an attribution standard higher than the broadcast standard:

> It is common in cable programming for a large number of cable operators each to take a small stake in a programmer, thus spreading control more widely among operators and arguing for a relatively large attribution figure.

MPAA Comments at 7 n.8. These "marketplace circumstances," when coupled with a low attribution standard, would result in widespread affiliations for cable programming services and significant carriage limitations because of the channel occupancy limits.

C. The "Channel" Occupancy Limits Should Be Expressed In Bandwidth.

In its Further Comments at 15-16, Liberty Media supported the proposal of TCI to implement the channel occupancy limits by counting the bandwidth occupied by affiliated programming services rather than the services themselves. This approach better accommodates expected technological developments and encourages cable operators and programmers to utilize digital compression and other advanced technologies to expand their service offerings without occupying additional "channels." Indeed, the Pay-Per-View Network, Inc. ("Pay-Per-View") explained in its Further Comments at 4 that it already has purchased a "digital transmission system which permits Viewer's Choice to compress its satellite programming transmissions on a five-to-one basis."

In opposing that proposal, the Local Governments claim that "[u]tilizing a measurement such as bandwidth would be directly contrary to the express language used by Congress." Local Governments Further Comments at 6 n.4. Rather than constituting a new approach contrary to the statutory language, TCI's proposal is mandated by statute and the Commission's regulations. Congress has defined a cable channel as:

> [A] portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).

47 U.S.C. §522(4). The Commission in turn has defined "television channel" as:

> A band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.

47 C.F.R. §73.681.[9] Thus, TCI's proposal is entirely consistent with and mandated by the statutory language and its legislative history.

Contrary to the unsupported assertion of the Local Governments in their Further Comments at 6 n.4, implementing the channel occupancy limits in terms of bandwidth will not be "more difficult to measure and enforce." With the advent of digital compression, cable systems will be able to transmit different numbers of programming services depending upon the nature of the programming being transmitted. See TCI Further Comments at 42-46; Time Warner Further Comments at 18-20,

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[9] The Commission also has defined "AM Broadcast Channel," "FM Broadcast Channel," "Main Channel," "Stereophonic Channel," and "DBS Channel" in terms of bandwidth. See TCI Further Comments at 39-40.

23-25. Thus, bandwidth provides a more reliable measure of "channel" occupancy.

D. The Commission Should Exclude Local, Regional, And Minority Programming Services From The Channel Occupancy Limits.

Virtually all commenters supported the Commission's tentative conclusion to exclude local and regional programming services from the channel occupancy limits, recognizing that such services foster diversity, provide significant coverage of local events, and promote the Congressional objective of local origination of programming.[10] Further Notice at ¶219. Again, only MPAA and Local Governments opposed this proposed exclusion. MPAA Further Comments at 10; Local Governments Further Comments at 9-10.

MPAA purports to base its opposition on the difficulty in identifying those programming services eligible for the exclusion and claims that the "must-carry" provisions ensure "the availability of local programming on cable networks." MPAA Further Comments at 10. Clearly, defining "local and regional programming services" will not be a difficult task. Liberty Media and other commenters have proposed straightforward definitions pursuant to which eligible pro-

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[10] See Further Comments of Affiliated Regional Communications, Ltd.; NCTA Further Comments at 21-22; Further Comments of Rainbow Programming Holdings, Inc. at 9-10; TCI Further Comments at 33-34; Time Warner Further Comments at 33; Turner Further Comments at 7; and Further Comments of Viacom International Inc. ("Viacom") at 8.

gramming services may be identified easily.[11] Moreover, local and regional cable programming services do not simply duplicate broadcast programming. For example, the Commission has found that regional sports networks have added substantially to the diversity of programming available to viewers through coverage of new and different sports which were previously "untelevised." See Interim Report, PP Docket No. 93-21, FCC 93-333 (rel. July 1, 1993) at ¶67.

Local Governments argue that, because "[m]ost local and regional networks offer primarily sports programming, and are part of large national conglomerates," the exclusion should be limited to non-commercial, not-for-profit programming. Local Governments Further Comments at 9-10. Notwithstanding Local Governments' inexplicable prejudice against sports programming, the Supreme Court has recognized that live coverage of "outstanding local events [such] as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest" serves the public interest. United States v. Midwest Video Corp., 406 U.S. 649, 668-69 (1972), quoting National Broadcasting Co. v. United

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[11] Liberty Media proposed in its Further Comments at 15 to define a "local and regional programming service" as "a video programming service which: (a) is marketed and distributed to viewers in a particular community, state or multistate geographic region rather than nationwide; and (b) originates programming of particular interest to, or sports coverage of teams located in or of particular interest to, that community, state or geographic region." Other commenters suggest that the Commission define "local and regional programming services" simply as non-national services. See NCTA Further Comments at 21-22; Time Warner Further Comments at 34.

States, 319 U.S. 190, 203 (1943) (emphasis added). Whether provided by "national conglomerates" or sole proprietors, such programming still fosters diversity and increases the amount of locally originated programming, which both Congress and the Commission have recognized to be in the public interest. Further Notice at ¶219.

Similarly, with the sole exception of MPAA, all commenters addressing the issue support the Commission's proposed exclusion from the channel occupancy limits for programming services which are "minority-controlled" or "targeted to a minority audience." Id. at ¶207. MPAA "do[es] not take a position exempting 'minority-controlled' programming services from this rule" and "strongly oppose[s]" the exclusion for "minority-oriented" programming because of the difficulty in "judging whether particular programming is targetted to minorities." MPAA Further Comments at 10. However, Liberty Media is confident that the Commission can craft an appropriate and manageable definition.

E. The Record Supports Other Revisions To The Channel Occupancy Limits.

Commenters have offered solid analytical and empirical support for exclusions to the channel occupancy limits for new programming services, widely viewed existing services, multiplex, and pay-per-view services. Viacom Further Comments at 5-7; Time Warner Further Comments at 25-30, 34-36; Further Comments of Encore Media Corporation at 8-10; Pay-Per-View Further Comments at 6-9. Each of these exclusions "take[s] particular account" of existing "market structure, ownership patterns, and other relationships" and "reflect[s] the dynamic nature of the communications marketplace." 47 U.S.C. §533(f)(2)(C), (E). Such proposals merit serious consideration and appropriate implementation.

Alternatively, Liberty Media respectfully submits that the need for these additional exceptions arises from the overly restrictive nature of the Commission's proposed channel occupancy limits in the context of today's marketplace. Thus, increasing the channel occupancy limits and/or the applicable attribution standard may present a more direct and workable solution to these problems.

In any event, the Commission now should establish a channel capacity ceiling beyond which the channel occupancy limits would no longer apply. Although the Commission expressed concern that a ceiling may be "premature" because of developing technology (Further Notice at ¶¶226-27), its failure to adopt such ceiling may "actually impair distribution opportunities for unaffiliated program services and will, more generally, interfere with the natural evolution of cable technologies." Time Warner Further Comments at 22; see Viacom Further Comments at 4; NCTA Further Comments at 17 n.39. The appropriate ceiling, which commenters generally have suggested as 54 to 75 channels, may be affected by the Commission's implementing rules.

F. The Commission Should Have Exclusive Jurisdiction To Enforce The Channel Occupancy Limits In Response To Complaints.

In order to ensure uniform interpretation and enforcement of the channel occupancy limits which potentially involve complex corporate and partnership structures, the Commission has proposed to "retain responsibility for monitoring and enforcing compliance" with such limits. Further Notice at ¶242. Because unaffiliated programmers will assist in ensuring compliance with the channel occupancy limits, Liberty Media submits that complaint-based enforcement would not only be effective, but also minimize the burdens on the Commission and cable operators. See also Time Warner Further Comments at 38-39; NCTA Further Comments at 25-26.

The Local Governments suggest in their Further Comments at 4-6 that local franchising authorities should be primarily responsible for enforcing the channel occupancy limits. However, the Local Governments largely confirm that franchising authorities do not have the required resources and experience. Thus, the Local Governments seek a waiver of authority "where a local franchising authority is unable to monitor and enforce the provisions adequately" or joint jurisdiction with the Commission thereby doubling the filing responsibilities of cable operators. Id. at 5. In short, the Local Governments resurrect the National Association of Telecommunications Officers and Advisors' prior proposal which the Commission rejected because of its "significant administrative burdens" and "duplication of efforts." Further Notice at ¶242 n.227.

Conclusion

The record in this proceeding demonstrates: (1) tangible benefits to programming diversity and to innovative technology resulting from "horizontal concentration" and "vertical integration;" (2) the absence of any abuse of market power or of discrimination against unaffiliated programmers; and (3) the minimal likelihood of such abuse or discrimination in the future, particularly because of the comprehensive behavioral protections adopted under the 1992 Cable Act. The record strongly supports the adoption of less restrictive structural constraints to permit and to encourage the continued growth, development and innovation of cable television.

Respectfully submitted,

September 3, 1993

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